

**IN THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF ILLINOIS  
URBANA DIVISION**

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In re:  
IKO ROOFING SHINGLE PRODUCTS  
LIABILITY LITIGATION

Case No. 09-md-2104  
MDL Docket No. 2104  
ALL CASES

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**DEFENDANTS' MOTION TO DISMISS  
PLAINTIFFS' SECOND AMENDED COMPLAINT**

Defendants IKO Manufacturing Inc., IKO Industries Inc., IKO Industries Ltd., IKO Pacific Inc., IKO Midwest Inc. and IKO Production Inc. ("Defendants") move this court to dismiss Plaintiffs' Amended Consolidated Class Action Complaint (D.E. #38) ("Complaint or Compl.") in its entirety because it fails to state a claim under Rules 12(b)(6) and 9(b) of the Federal Rules of Civil Procedure. Defendants incorporate their accompanying memorandum of law and state as follows:

1. At the heart of this case is Plaintiffs' contention that the Defendants warranted that all of their organic shingles<sup>1</sup> "are permanent, impact resistant, and would maintain their structural integrity" for a "specified life ranging from 25 to 50 years, or in some cases, for a lifetime." (Compl. ¶¶ 4, 70.) This contention is simply contrary to the actual language of Defendants' written limited warranties, which varied significantly for different IKO shingles sold throughout the proposed thirty-year class period. None of the nine Plaintiffs in this case has alleged a claim that falls within the terms of his or her particular limited warranty. This deficiency is fatal to each of their claims, and the Complaint should be dismissed in its entirety.

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<sup>1</sup> All asphalt shingles have either an organic felt or fiberglass mat as the base material. Plaintiffs have expressly disclaimed any claims based on Defendants' fiberglass shingles. (Compl. ¶¶ 2, 34.)

2. In deciding a Rule 12(b)(6) motion to dismiss, “the court ha[s] to decide whether the Complaint include[s] ‘enough *facts* to state a claim to relief that is plausible on its face.’” *Hecker v. Deere & Co.*, 556 F.3d 575, 580 (7th Cir. 2009) (emphasis added) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Federal Rules of Civil Procedure “demand[] more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly*, 550 U.S. at 555). As such, a complaint that “tenders naked assertions devoid of further factual enhancement” does not suffice, and “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,” do not state a claim. *Id.* Rather, “[t]o survive a motion to dismiss, a complaint must contain sufficient *factual matter* . . . to ‘state a claim to relief that is plausible on its face.’” *Id.* (emphasis added).

3. Since Plaintiffs allege breach of warranty and breach of contract claims, Defendants may attach the actual express warranties to their motion to dismiss without converting the motion into one for summary judgment. *188 LLC v. Trinity Indus. Inc.*, 300 F.3d 730, 735 (7th Cir. 2002) (explaining “documents . . . referred to in the plaintiff’s complaint [which] are central to his claim . . . may be considered by a district court in ruling on the motion to dismiss.”); *see also Tierney v. Vahle*, 304 F.3d 734, 738 (7th Cir. 2002) (plaintiff cannot avoid dismissal “simply by failing to attach to his complaint a document that proved that his claim had no merit.”) As the Seventh Circuit has further explained, “where an exhibit conflicts with the allegations of the complaint, the exhibit typically controls....” *Massey v. Merrill Lynch & Co.*, 464 F.3d 642, 645 (7th Cir. 2006).

4. Because the claims of each Plaintiff are subject to different facts, including different warranties, and different legal standards, Defendants move to dismiss each claim of each Plaintiff separately under the governing substantive and procedural law applicable to that Plaintiff.

**Debra Zanetti.**

5. **Choice of law.** The Seventh Circuit recently confirmed that “when a diversity case is transferred by the multidistrict litigation panel, the law applied is that of the jurisdiction from which the case was transferred,” including the transferor court’s choice of law rules. *Chang v. Baxter Healthcare Corp.*, No. 09-2280, 2010 U.S. App. LEXIS 6257, at \*6 (7th Cir. Mar. 26, 2010). In other words, for purposes of choice of law, the Seventh Circuit treats each individual case within the MDL as if it is a stand-alone diversity case in the district it was originally brought. *See id.*

6. Zanetti brought her claims in her home state of New Jersey. Consequently, New Jersey procedural law, including its statutes of limitation and New Jersey choice of law rules, will apply to her claim. *P.V. ex rel. T.V. v. Camp Jaycee*, 197 N.J. 132, 136 (2008) (New Jersey applies the “most significant relationship” test for choice of law analysis). Under the most significant relationship test, a New Jersey court would apply New Jersey substantive law to each of Zanetti’s claims because the alleged injuries occurred in New Jersey. *Id.*

7. **Individual claims.** Zanetti’s express warranty claim (Count IV) should be dismissed because she has not stated a claim under the terms of her warranty and because it is time-barred. Her breach of implied warranty claim (Count V) fails because Defendants properly disclaimed any implied warranties, she failed to plead pre-suit notice, and the claim is time-barred. Her breach of contract claim (Count VII) should be dismissed because the UCC exclusively governs the sale of roofing shingles and she has not pled a valid contract. Her unjust enrichment claim (Count IX) is barred by the existence of the express limited warranty and an adequate remedy at law in the form of money damages, as well as by the applicable statute of limitations.

8. Zanetti's strict liability claim (Count III) and negligence claim (Count I) should be dismissed because they are barred by the New Jersey Product Liability Act, and, in any event, are barred by the economic loss doctrine.

9. Her claim for violation of the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA") (Count VI) fails because the ICFA does not apply to transactions outside Illinois, has not been pled with specificity under Rule 9(b), and is time-barred. Her misrepresentation claim (Count II) also fails under Rule 9(b). In addition, to the extent she attempts to allege a negligent misrepresentation claim in Count II, the claim is barred by the economic loss doctrine. Her fraudulent concealment claim (Count VIII) fails under Rule 9(b) and because she fails to allege a fiduciary or other special relationship between Defendants and herself.

#### **Daniel Trongone**

10. **Choice of law.** Under *Chang, supra*, because Trongone, like Zanetti, brought suit in his home state of New Jersey, New Jersey statutes of limitations and substantive law will apply to his claims.

11. **Individual claims.** Trongone's claims should be dismissed for the same reasons as Zanetti's claims.

#### **Gerald Czuba**

12. **Choice of law.** Under *Chang, supra*, because Czuba brought suit in his home state of New York, New York statutes of limitations, choice of law rules and substantive law will apply to his claims. See *Globalnet Financial.com, Inc. v. Frank Crystal & Co.*, 449 F.3d 377, 384 (2d Cir. 2006) (applying New York's "interest analysis" and noting that the law of the place where the tort occurred generally applies).

13. **Individual claims.** Czuba's breach of express warranty claim fails because he has not stated a claim under the terms of his warranty. His breach of implied warranty, breach of

contract, and unjust enrichment claims fail for the same reasons as Zanetti's claims under New York law, and his breach of contract and unjust enrichment claims are time-barred by the applicable New York statutes of limitations.

14. Czuba's strict liability and negligence claims are barred by the economic loss doctrine as construed by New York courts, and his strict liability claim also fails because he does not allege that his shingles were "unreasonably dangerous."

15. Czuba's misrepresentation, ICFA and fraudulent concealment claims fail for the same reasons as Zanetti's under New York law. These claims are also barred by the applicable New York statutes of limitations. To the extent that he attempts to allege a claim for negligent misrepresentation, that claim should be dismissed because it is not timely and he fails to plead that he is in privity with Defendants as required by New York law.

#### **Michael Augustine**

16. **Choice of law.** Augustine, a New York resident, originally brought his claim in a federal court in Washington state. That state applies a "most significant relationship" choice of law test. *Bybee Farms, LLC v. Snake River Sugar Co.*, 625 F. Supp. 2d 1073, 1078 (E.D. Wash. 2007). As a result, the substantive law of Augustine's state of residence, New York, would govern his claims. *See Yorong v. Total Renal Care, Inc.*, No. 08-5006, 2008 U.S. Dist. LEXIS 109480, at \*5-6 (E.D. Wash. July 8, 2008) (law of place of injury presumptively applies). As to the statute of limitations, the Seventh Circuit held in *Chang* that the statutes of limitations of the transferor state, including its borrowing statute, will apply. *See Chang*, 2010 U.S. App. LEXIS 6257, at \*6-8. The Washington borrowing statute states that "if a claim is substantively based [u]pon the law of one other state, the limitation period of that state applies." *See* REV. CODE WASH. 4.18.020. Consequently, a federal court in Washington would apply New York's statutes of limitations to Augustine's claims.

17. **Individual claims.** Augustine's claims should be dismissed for the same reasons as Czuba's claims.

**Michael Hight**

18. **Choice of law.** Like Augustine, Hight brought his claims in Washington, not his home state of Ohio. For the same reasons listed above, Ohio's statutes of limitations and substantive law apply to Hight's claims.

19. **Individual claims.** Hight's breach of express warranty, breach of implied warranty, breach of contract, unjust enrichment and misrepresentation/omission claims fail for the same reasons as Zanetti's under Ohio law. His unjust enrichment claim is also time-barred under Ohio law. The Ohio version of the economic loss doctrine bars his negligence and strict liability claims. His strict liability claim also fails because he has not plead that the shingles are "unreasonably dangerous." To the extent that he alleges a negligent misrepresentation claim in Count II, it fails because Defendants are not in the business of supplying information for the guidance of others as required by Ohio law.

**James K. Cantwil**

20. **Choice of law.** Cantwil brought his claims in Illinois, not in his home state of Michigan. Illinois applies the "most significant relationship" test to determine which state's substantive law applies. *In re Trans Union Corp. Privacy Litig.*, 211 F.R.D. 328, 343 (N.D. Ill. 2002). Under this test, Michigan's substantive law will apply to Cantwil's claims. *See Fredrick v. Simmons Airlines*, 144 F.3d 500, 504 (7th Cir. 1998) (under Illinois choice of law principles, the law of the place of injury presumptively applies); *Abad v. Bayer Corp.*, 563 F.3d 663, 669 (7th Cir. 2009) (same); *Carris v. Marriott Int'l Inc.*, 466 F.3d 558, 560 (7th Cir. 2006) (same). Under *Chang*, Illinois' borrowing statute will apply for purposes of determining the applicable statutes of

limitations.<sup>2</sup> Under that borrowing statute, the Court first looks to whether the claim is time-barred in Michigan. 735 ILL. COMP. STAT. 5/13-210; *see American Heavy Trading v. Gen. Elec. Co.*, 1996 U.S. Dist. LEXIS 14225, \*17 (N.D. Ill. Sept. 27, 1996). If it is barred there, it is barred in Illinois. *See id.* However, if it is timely in Michigan, but would not be timely in Illinois, Illinois' shorter statute of limitations applies and the claim is still time-barred. *See id.*

21. **Individual claims.** Cantwil's breach of express warranty, breach of implied warranty, breach of contract, unjust enrichment and misrepresentation/omissions claims should be dismissed for the same reasons as Zanetti's under Michigan law. His breach of contract and unjust enrichment claims are also time-barred. His negligence, strict liability, and fraud claims are barred by the economic loss doctrine. In addition, his strict liability claim fails because Michigan law does not recognize common law strict liability claims in product liability cases. Any negligent misrepresentation claim must fail because Cantwil does not allege that he is in privity with Defendants as required by Michigan law.

### **Belinda Curler**

22. **Choice of law.** Like Cantwil, Curler brought her claims in Illinois, not her home state of Iowa. For the same reasons listed above, Iowa's substantive law, Illinois' borrowing statute, and the shorter of the Illinois or Iowa statutes of limitations apply to Curler's claims.

23. **Individual claims.** Curler's breach of express warranty, breach of implied warranty, breach of contract, unjust enrichment and misrepresentation/omission claims all fail for the same reasons as Zanetti's under Iowa law. Further, Curler's breach of express warranty, breach

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<sup>2</sup> The Illinois borrowing statute applies if no party is a citizen of Illinois. *See Hollinger Int'l, Inc. v. Hollinger Inc.*, 2005 U.S. Dist. LEXIS 21305, at \*83-84 (N.D. Ill. Mar. 11, 2005). None of the Plaintiffs is a resident or citizen of Illinois, and none of the Defendants is a resident or citizen of Illinois. *See Telular Corp. v. Mentor Graphics Corp.*, 282 F. Supp. 2d 869, 872 (N.D. Ill. 2003) (a defendant corporation is a citizen of Illinois under the Illinois borrowing statute only if the defendant is incorporated in Illinois).

of implied warranty, and unjust enrichment claims are time-barred. Curler's negligence and strict liability claims are barred by the economic loss doctrine. Her strict liability claim also fails because she has not pled that the shingles are "unreasonably dangerous." Any negligent misrepresentation claim also fails under the economic loss doctrine and because Defendants are not in the business of supplying information as required by Iowa law.

### **Vincent Dion**

24. **Choice of law.** Like Cantwil and Curler, Dion brought his claims in Illinois, not his home state of Massachusetts. For the same reasons listed above, Massachusetts' substantive law, Illinois' borrowing statute, and the shorter of the Illinois or Massachusetts statutes of limitations apply to Dion's claims.

25. **Individual claims.** Dion's breach of express warranty, breach of implied warranty, breach of contract, unjust enrichment and misrepresentation/omission claims fail for the same reasons as Zanetti's under Massachusetts law. Further, Dion's unjust enrichment claim is time-barred. Dion's negligence and strict liability claims are barred by the economic loss doctrine. His strict liability claim also fails because he has not plead that the shingles are "unreasonably dangerous" as required by Massachusetts law. Any negligent misrepresentation claim fails because Dion has not pled Defendants have actual knowledge of his reliance on any alleged misrepresentation.

### **David Greenough**

26. **Choice of law.** Like Cantwil, Curler and Dion, Greenough brought his claims in Illinois, not his home state of Vermont. For the same reasons listed above, Vermont's substantive law, Illinois' borrowing statute, and the shorter of the Illinois or Vermont statutes of limitations apply to Greenough's claims.

27. **Individual claims.** Greenough's breach of express warranty, breach of implied warranty, breach of contract, unjust enrichment and misrepresentation/omission claims all fail for the same reasons as Zanetti's under Vermont law. Further, Greenough's unjust enrichment claim is time-barred. Greenough's negligence, strict liability, and negligent misrepresentation claims are barred by the economic loss doctrine. Like Dion, his strict liability claim also fails because he has not pled that the shingles are "unreasonably dangerous" as required by Vermont law.

**WHEREFORE**, Defendants respectfully request that the Court dismiss Plaintiffs' Amended Consolidated Class Action Complaint in its entirety.

**REQUEST FOR ORAL ARGUMENT**

Given the large number of issues presented in this motion, pursuant to Local Rule 7.1(A)(2), Defendants request oral argument on this motion. Oral argument is appropriate to respond to any questions the Court might have regarding the multiplicity of non-Illinois legal issues addressed in this motion. Also, Defendants anticipate that Plaintiffs may raise issues for the first time in their opposition brief that must be addressed at oral argument because the Local Rules do not permit Defendants to file a reply brief in support of their Motion to Dismiss.

Dated: May 3, 2010

Respectfully submitted,

**IKO MANUFACTURING INC.,  
IKO INDUSTRIES INC.,  
IKO INDUSTRIES LTD.,  
IKO PACIFIC INC.,  
IKO MIDWEST INC., and  
IKO PRODUCTION INC.**

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 3, 2010, I caused a copy of the foregoing document to be served upon all counsel of record via ECF Notice of Electronic Filing.

/s/ Christopher M. Murphy